No. 3319

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE NORMA MINING COMPANY
(a corporation),
Appellant,

vs.

HUGH MACKAY,
Appellee.

PETITION FOR REHEARING ON BEHALF OF APPELLANT.

LLOYD MACOMBER,
Humboldt Bank Building, San Francisco,
MAURICE T. DOOLING, JR.
City Hall, San Francisco,
Attorneys for Appellant and Petitioner.

No. 3319

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE NORMA MINING COMPANY
(a corporation),
Appellant,

vs.

HUGH MACKAY,
Appellee.

PETITION FOR REHEARING ON BEHALF OF APPELLANT.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant respectfully asks that the decision of this Honorable Court, made in this cause, on the 7th day of July, 1919, be set aside and a rehearing granted.

In support of its petition appellant desires to urge the following points:

1. We believe that the Court has been led into error in holding that the notice of sale "between legal hours" was sufficiently definite as to time.

2. We believe that the record clearly shows that this Court has inadvertently fallen into error in holding that the description of the property in the notice of sale is exactly as given in the mortgages.

---

1. THE NOTICE WAS INSUFFICIENT IN STATING THAT THE SALE WOULD TAKE PLACE "BETWEEN THE LEGAL HOURS OF SALE".

This sale was held under the provisions of the Act of Congress adopted March 3, 1893, Chapter 225, 27 Stat. L. 751, entitled "An act to regulate the manner in which property shall be sold under orders and decrees of any United States Courts."

At the outset we desire to urge upon the Court a consideration which, through inadvertence, was not mentioned in the briefs. We were so confident of the correctness of our position that a specific hour must be designated in the notice of sale that we assumed that the Statute of Arizona fixing the legal hours of sale for real property was applicable to this sale. But we are satisfied upon reflection that this is not the case.

An examination of the Act of Congress governing this sale will show that it *does not fix any hours* during which a sale of real property or any sale must or shall be held. For anything that appears in the Act to the contrary such a sale may be held at any reasonable hour, and the Statute of Arizona clearly cannot limit the power of the Federal Courts in this regard. There being no legal hours of sale

provided in the Act of Congress under which the sale was held, it would seem to follow necessarily that the statement in the notice that the sale would be held "between the legal hours of sale" is meaningless. The notice is no more than a notice that the sale would be held on a certain day, and the reference to "legal hours" when none are provided in the Act governing the sale is worse than useless.

But even if the notice in designating "legal hours of sale" be construed as designating the hours of 10 A. M. to 4 P. M. fixed by the Arizona Statute, we think the Court has been led into error in deciding that such a notice is sufficient.

The Court in its opinion quotes from, and apparently relies upon the reasoning of, the opinion in the case of *Burr v. Borden,* 61 Ill. 389. This case was not cited in Appellee's brief and we had no opportunity prior to the decision of this Court to comment upon or discuss it.

In the first place the case of *Burr v. Borden,* was a collateral attack upon the sale and it needs no citation of authorities to establish the well settled rule that Courts are extremely reluctant to set aside a judicial sale in a collateral proceeding. To do so they must hold the sale not only voidable but void. As the Court said in this very case of *Burr v. Borden,* at p. 396:

> "In the case before us, whatever doubts the evidence tends to raise must be resolved against the complainants, when we consider the position of Blake as an innocent purchaser on the one hand, and the long acquiescence on the

> other, of all parties affected by the sale sought to be set aside."

The Court in the *Burr* case said, referring to the notice of sale there in question:

> "Persons who see the advertisement and desire to attend the sale, can easily ascertain the hour by inquiring of the parties about to make the sale."

Let us apply this reasoning to our own case. The Federal District Court sits in Phoenix, Arizona. The sale was held at Kingman, Mohave County, Arizona, almost a full day's journey from Phoenix by train. It was held by a special master who resided at Phoenix, and only went to Kingman to hold the sale. The notice of sale was inserted in a newspaper published in the town of Kingman. How can it be said that persons in Kingman or Mohave County who might see the advertisement and desire to attend the sale could easily, or at all without great difficulty, ascertain the hour by inquiry of the special master who resided at Phoenix, a day's journey away. As a matter of fact, although this does not appear from the record, at the time of the first attempted sale, which was afterward set aside by the Court, appellant sent a telegram to the sheriff of Mohave County to be delivered to the special master, and although the sheriff watched the courthonse door in Kingman, where the sale was noticed to be held, all during the day fixed for the sale he did not see the master and was unable to deliver the telegram. We think that it is obvious

that it is not true that persons who saw this advertisement and desired to attend the sale could easily ascertain the hour by inquiring of the parties about to make the sale.

The Court in the *Burr* case, continued:

> "If unwilling to wait at the appointed place, and if deceived by them and prevented from making a desired bid, the sale might be set aside."

We submit that it is unfair to place the burden upon the defendant to discover and show that parties were unwilling to wait at the appointed place or were deceived and prevented from making a bid. It would be very difficult, and in most cases absolutely impossible, for the defendant to discover or ascertain whether or not members of the public had been prevented from bidding by the character of the notice. It might be that a great many people would be deterred from attending the sale, and yet they would in ninety-nine cases out of one hundred never take the trouble to advise the defendant of that fact, even if they knew where the defendant could be reached. The notice should be of such a character that there would be no danger of prospective bidders being discouraged or prevented from bidding at the sale.

The arguments advanced by the Court in the *Burr* case based upon the convenience of noticing a sale to be held between certain hours are, we submit, more than counter-balanced by the manifest incon-

venience to the bidding public and consequent unfairness to the defendant from such notice.

It should be further noticed that this case of *Burr v. Borden* is directly overruled by the later Illinois case of *Bondurant v. Bondurant,* 96 N. E. 306, where the Court expressly held that the notice of sale must specify the exact hour. This Court was mistaken in saying that in the *Bondurant* case "the Court refers to the statute as one which prohibits the sale unless the time of day is specified in the notice." What the Court did say in the *Bondurant* case was that the act with regard to executions provides that the time of day be specified "and manifestly similar rules should apply to judicial sales in general" (96 N. E. 308).

This Court in its opinion adverts to the Statutes of Arizona, paragraph 2570 (R. S.) with regard to the sale of real property and says:

> "The Arizona statute quoted in the statement does not contain a requirement that the notice shall specify the time and place of sale, although the general provision is that sale shall be between the hours of ten o'clock A. M. and four o'clock P. M."

But the Court only quoted the third subdivision of paragraph 2570 (R. S.). The whole paragraph reads as follows:

> "Notice of sale under execution shall be made as follows:
> (1) In the case of perishable property, by posting written notice of *the time and place of sale* in three public places, two of which shall be

in the precinct and one at the door of the court house of the county in which the sale is to take place, for such a period of time before the sale as may be reasonable, considering the character and condition of the property.

(2) In case of other personal property, by posting a similar notice in three public places in the county, one of which shall be at the court house door and two in the precinct where the sale is to take place, for not less than ten days successively before the day of sale.

(3) In case of real property, by posting notices in three public places in the county, one of which shall be at the court house door, and publishing a copy thereof in some newspaper printed within the county, if there be one, for three weeks before the day of sale. Such notices shall notice the judgment, parties, amount and court in which it was rendered, and particularly describe the property to be sold. Real property shall be sold at the court house door of the county wherein situated between the hours of ten o'clock A. M. and four o'clock P. M. Personal property shall be sold on the premises where it is taken in execution, or at the court house door of the county, or at some other place, if, owing to the nature of the property, it is more convenient to exhibit it to purchasers at such place."

We think it evident that the notice for the sale of real property equally with the notice for the sale of perishable property and other personal property provided for in this paragraph 2570 (R. S.) must specify the time and place of sale.

In addition to this the Court absolutely failed to consider the provision of Section 1369 of the Ariz-

ona Civil Code of 1913 providing for the postponement of sales as follows:

> "The sheriff or other officer may postpone the sale from time to time. In case of such postponement the posting and publication of notice, if it be published, must be continued until the day to which the sale is postponed, and there shall be appended at the foot of the published and posted notice a memorandum in substantially the following form:
>
> " 'The above sale is postponed until the..... day of....., 19....., at..... o'clock.....M.
>
> Sheriff (or other official title as the case may be).' "

As we said in our closing brief herein, it is well settled that all parts of a statute must be construed together to make a harmonious whole. The provision for a notice of postponement to "..... o'clock .....M." indicates that a particular hour must be named. But certainly no more particularity in this regard will be required of the notice of postponement than of the original notice.

This sale was conducted under the Act of Congress above referred to, and the provisions of the Arizona law are important only as showing the practice in that State. Nevertheless as said in *Bondurant v. Bondurant,* quoted *supra* "manifestly similar rules should apply to judicial sales in general."

The Court also failed to notice that in the decree in this case it is expressly provided that the Master shall give "public notice of the *time* and place of said sale" (Trans. p. 23).

We feel that in announcing the rule which it has on this point this Court has set its face squarely against the modern trend of authority. The case of *Burr v. Borden* was decided in 1871. The case of *Evans v. Robberson* also relied upon by the Court was decided in 1887. On the other hand of the cases cited by appellant on this point *Bondurant v. Bondurant* was decided in 1911, *Hayes v. Pace,* 78 S. E. 290, was decided in 1913, and *Jensen v. Andrews,* 163 N. W. 571, was decided in 1917. If this case had arisen prior to 1911, *Fitzpatrick v. Fitzpatrick,* 6 R. I. 64, would have been the sole authority in support of the position, that the notice of sale must fix a particular hour. We submit that the fact that all of the recent cases have held directly contrary to what was up to ten years ago the practically accepted rule is not due to mere accident. It is more than a coincidence. It is based upon the fact that the older cases were wrong in principle, and that the modern courts realize this fact and have determined to fix a juster and more reasonable rule.

Commenting on the older cases Freeman in his work on *Executions,* 3d Ed., Vol. II, Sec. 285c, p. 1646, says:

> "It would seem that the notice ought to *name the very hour* at which the sale will commence, so that persons having any inclination to attend will not be deterred from doing so by the fact that they might be kept waiting during all the business hours of the day."

Since the learned author wrote this at least three Courts in the cases which we have cited have reached

the same conclusion. Is this Court going to turn its back upon those decisions and revert to the line of authorities which Mr. Freeman criticized? This is the first time that a Federal Court has been called upon to say what sort of a notice is required by the Act of Congress of March 3, 1893. We feel very strongly that this Court in deciding this question should reconsider its decision in this case, and should align itself with what we must consider the correct and more liberal doctrine, that a notice of sale should specify the precise hour at which the sale is to be held.

We urge this the more earnestly because the Court is laying down not only the rule to be applied in the instant case, but a rule of practice which will govern all judicial sales hereafter to be held in this Circuit. In doing this it should satisfy itself that it is not establishing a rule which will work injustice or oppression, but one which will tend to promote fairness and secure the highest possible figure in all judicial sales.

---

2. THE DESCRIPTION OF THE PROPERTY IN THE NOTICE OF SALE IS NOT "EXACTLY AS GIVEN IN THE MORTGAGES".

This Court said in its opinion in this case:

> "The description included within the notice is exactly as given in the mortgage under which the sale was made and was sufficient."

In so holding this Court has inadvertently fallen into error.

The description of the property in the notice of sale clearly described too much, as pointed out in our closing brief.

The two mortgages, Exhibits "B" and "E", Transcript pp. 68 and 72, reserved to the mortgagor the right to work the mines and remove the ore therefrom in the usual manner until the property shall have been sold and *conveyed* under foreclosure proceedings.

On page 69 of the transcript we read:

> "In executing this instrument the Mortgagor reserves the right to mine ore and to operate this property in the usual and customary way of mining and operating such property, taking and using any and all proceeds, incomes and profits from said property as fully and to the same extent as if this indenture had not been made, until the property may be sold and conveyed under this mortgage by reason of the default of the payment provided herein, in event that such default should occur."

The other mortgage likewise provides (Trans. p. 74).

> "Until default shall be made in payments of principal, interest, or some of them, or until defaults shall be made in respect to something herein required to be done, performed or kept by said party of the first part, and until the property herein conveyed shall have been sold and conveyed to said party of second part or his assigns or other purchaser by reason of such default, the said party of the first part shall be suffered and permitted to possess, operate, manage, lease, use and enjoy the said property hereby conveyed and every part and parcel thereof, with the full right and privilege of

> developing, mining, breaking down, extracting, milling, removing, selling and disposing of any and all ores and products of said property and of taking and using any and all proceeds, rents, royalties, products, incomes or profits from the said property as fully and to the same extent as if this indenture had not been made."

It is obvious that the description of the property in the notice of sale should have mentioned this reservation. The rights reserved in the mortgages were valuable property rights. *Pro tanto* until these rights were extinguished by the execution of a deed at the end of the period of redemption appellant continued to be the owner to that extent. To fail to mention this reservation in the description was in effect to include in the description and consequently in the sale these valuable rights which the mortgage itself reserved to appellant. It was no different than if, in selling the fee belonging to a remainderman, a life estate belonging to another person should be included in the description, and sold.

It is clear that property belonging to appellant which was not covered by appellee's mortgages, but expressly excluded therefrom, has nevertheless been advertised and sold to appellant's injury.

We respectfully submit, therefore, that this Court should grant a rehearing in this cause and give further consideration to the points suggested, to wit:

(a) That the Act of Congress of March 3, 1893, under which the sale was made provides no hours of sale and, therefore, that the notice that the sale

would be held "between legal hours of sale" was meaningless;

(b) That in any event the notice should specify a particular hour of sale;

(c) That the description of the property was incorrect and prejudicial because it did not refer to or exclude the reservations expressly made in favor of appellant in the mortgages.

Dated, San Francisco,
August 4, 1919.

Respectfully submitted,
LLOYD MACOMBER,
MAURICE T. DOOLING, JR.
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco,
August 4, 1919.

MAURICE T. DOOLING, JR.
Of Counsel for Appellant and Petitioner.